88-7503
NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

CARLOS A. TAYLOR,

Petitioner,

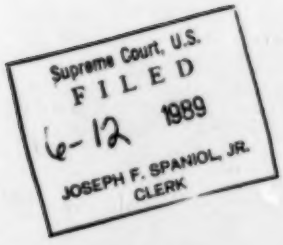
v.

UNITED STATES OF AMERICA,

Respondent.

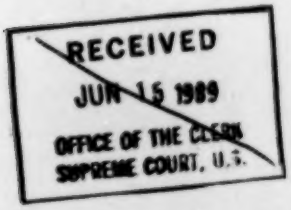
On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI



Respectfully submitted,

ROLAND E. DAHLIN II
Federal Public Defender
Southern District of Texas
Attorney of Record



H. MICHAEL SOKOLOW
JUAN E. GAVITO
Asst. Federal Public Defenders
Attorneys for Petitioner
Post Office Box 61508
Houston, Texas 77208-1508
Telephone: (713) 220-2194
(FTS) 526-4194

QUESTION PRESENTED

WHETHER IT IS A VIOLATION OF THE STATUTORY DIRECTIVE UNDER 18 U.S.C. § 3553(a)(4), (5), FOR A DISTRICT COURT TO DISREGARD THE SENTENCING GUIDELINES BASED UPON A FINDING THAT A DEFENDANT'S CRIMINAL HISTORY SCORE INADEQUATELY ACCOUNTS FOR HIS PAST CONDUCT, WHEN THE DISTRICT COURT COULD HAVE CONSIDERED INCREASING THE CRIMINAL HISTORY CATEGORY BY ONE OR MORE LEVELS TO ADJUST FOR THE SITUATION.

LIST OF PARTIES BELOW

1. United States of America.
2. Carlos A. Taylor.

TABLE OF CONTENTS

	Page
Question Presented..... Whether it is a violation of the statutory directive under 18 U.S.C. § 3553(a)(4), (5), for a district court to disregard the Sentencing Guidelines based upon a finding that a defendant's criminal history score inadequately accounts for his past conduct, when the district court could have considered increasing the criminal history category by one or more levels to adjust for the situation.	i
List of Parties Below.....	i
Table of Contents.....	ii
Table of Authorities.....	iii
Prayer.....	1
Opinions Below.....	1
Jurisdiction.....	1
Constitutional, Statutory, and Sentencing Guidelines Provisions Involved.....	2
Statement of the Case.....	3
Course of Proceedings.....	3
Statement of the Facts.....	3
Basis of Federal Jurisdiction.....	5
Reasons for Granting the Writ.....	6
Conclusion.....	9
Appendix A: Op., United States v. Taylor, No. 88-6158, (5th Cir. Apr. 12, 1989).....	10
Appendix B: Transcript of Sentencing, United States v. Taylor, Cr. No. B-88-186 (S.D. Texas, Nov. 11, 1988).....	14
Appendix C: Op., United States v. Lopez, 871 F.2d 513 (5th Cir. 1989).....	18

TABLE OF AUTHORITIES

Page

CASES

Hicks v. Oklahoma, 447 U.S. 343 (1980)..... 8

United States v. Burch, No. 88-2680, slip op. at 3724 (5th Cir. May 10, 1989)..... 8

United States v. Lopez, 871 F.2d 513 (5th Cir. 1989)..... 6, 7, 8,

United States v. Taylor, No. 88-6158, (5th Cir. Apr. 12, 1989)..... 1

CONSTITUTIONAL PROVISION

U.S. Const. amend V..... 2

STATUTES

18 U.S.C. § 111..... 3, 5

18 U.S.C. § 3553(a)..... i, 2, 6, 8

21 U.S.C. § 844(a)..... 4

21 U.S.C. § 952(a)..... 4

21 U.S.C. § 960(b)(4)..... 4

28 U.S.C. § 994(a)..... 2

28 U.S.C. § 1254(1)..... 1

PRAYER

The Petitioner, CARLOS A. TAYLOR, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued April 12, 1989.

OPINIONS BELOW

A copy of the opinion of the United States Court of Appeals for the Fifth Circuit in Cause No. 88-6158, United States v. Carlos A. Taylor, is attached as appendix A.

On April 12, 1989, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction in this case.

JURISDICTION

On April 12, 1989, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction in this case.

Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

CONSTITUTIONAL, STATUTORY, AND SENTENCING GUIDELINES PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law ....

U. S. Const. amend. V.

Subsections (a)(4) and (a)(5) of Section 3553, Title 18, United States Code, state in pertinent part:

> (a)...The court, in determining the particular sentence to be imposed, shall consider --
>
> ...
>
> (4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;
>
> (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced... .

18 U.S.C. § 3553(a)(4),(5).

Section 4A1.3 of the Sentencing Guidelines states in pertinent part:

> If ... the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct ..., the court may consider imposing a sentence departing from the otherwise applicable guideline range ... .
>
> ...
>
> A departure under this provision is warranted when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes ... .
>
> ...
>
> In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history category of III significantly under-represents the seriousness of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with a

> Category IV criminal history, the court should look to the guideline range specified for a defendant with a Category IV criminal history to guide its departure.

STATEMENT OF THE CASE

Course of Proceedings

The petitioner, CARLOS A. TAYLOR, pleaded guilty on September 23, 1988, to one count of forcibly impeding a United States Customs Officer, in violation of 18 U.S.C. § 111. Pursuant to a plea agreement, the government dismissed the three other counts in the indictment. On November 11, 1988, the district court, over objection of defense counsel, departed upward from the imprisonment range dictated by the Sentencing Guidelines and sentenced Mr. Taylor to custody of the Attorney General for eighteen months and also imposed a term of one-year supervised release and a fifty dollar special assessment. The Court of Appeals for the Fifth Circuit affirmed Mr. Taylor's sentence on April 12, 1989.

STATEMENT OF FACTS

On August 14, 1988, Mr. Taylor entered the United States from Mexico at Brownsville, Texas. After a United States Customs Officer directed his vehicle to secondary inspection, a dog belonging to the Customs Service alerted on Mr. Taylor's vehicle. Mr. Taylor attempted to flee on foot back to Mexico, and in the process, knocked down a Customs Officer who was trying to stop him.

On August 24, 1988, Mr. Taylor was charged in a four-count indictment with two counts of forcibly impeding a United States

Customs Officer, in violation of 18 U.S.C. § 111, one count of importing approximately 15.5 grams of marijuana, in violation of 21 U.S.C. §§ 952(a), 960(b)(4), and one count of possessing approximately 15.5 grams of marijuana, in violation of 21 U.S.C. § 844(a). On September 23, 1988, Mr. Taylor pleaded guilty to one count of forcibly impeding a United States Customs Officer, in exchange for the government's agreement to dismiss the other three counts.

Prior to sentencing, a United States Probation Officer prepared a presentence report. The report found that Mr. Taylor's offense was a minor assault and, pursuant to section 2A2.3 of the Sentencing Guidelines, determined that the base offense level for the offense was 6. Under section 3C1.1 of the Sentencing Guidelines, the report added 2 points to the offense level for obstruction of justice, in light of Mr. Taylor's attempt to flee, but it also subtracted 2 points from the offense level, under section 3E1.1(a), for Mr. Taylor's acceptance of responsibility. Thus, the report found Mr. Taylor's total offense level to be 6.

Based on Mr. Taylor's prior criminal record, the presentence report further found that his criminal history score totalled 4 points, placing him in criminal history category III. Based on a total offense level of 6 and a criminal history category of III, the report concluded that the guideline imprisonment range for Mr. Taylor's offense was 2 to 8 months.

On November 11, 1988, the district court departed from the guideline imprisonment range and sentenced Mr. Taylor to eighteen months in the custody of the Attorney General and also imposed a term of one-year supervised release to follow imprisonment and a fifty dollar special assessment. Upon objection to the sentence by defense counsel, the district court stated that it was departing upward in sentencing Mr. Taylor because of his prior convictions and his general

demeanor and conduct, and because it did not "agree with the guidelines because of their prior involvement in giving the points." The sentence of eighteen months imposed by the district court was the maximum sentence allowed for under criminal history category VI, the highest criminal history category, with a total offense level of 6. In departing upward, the court gave no consideration to the guideline imprisonment ranges dictated by intermediate criminal history categories IV and V, but instead sentenced Mr. Taylor to eighteen months incarceration because of its disagreement with the guidelines' method of calculating the criminal history score.

On April 12, 1989, the court of appeals affirmed the sentence, finding that the district court had properly applied the guidelines.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This is a prosecution brought by the United States alleging a violation of Section 111, Title 18, United States Code.

REASONS FOR GRANTING THE WRIT

THE ERRONEOUS APPLICATION OF THE SENTENCING GUIDELINES PRESENTS A SIGNIFICANT ISSUE OF THE PROPER APPLICATION OF FEDERAL LAW.

In departing upward, the district court completely disregarded the express dictates of the Sentencing Guidelines and thus violated the statutory directive of 18 U.S.C. §3553(a)(4), (5). The court of appeals also disregarded the statutory directive in affirming the sentence in this case. As a subsequent Fifth Circuit opinion recognizes, the precise issue presented in this case is "a significant question concerning the appropriatenss of a departure from the Guidelines." United States v. Lopez, 871 F.2d 513, 514 (5th Cir. 1989). In fact, the Lopez opinion, which addressed the same misapplication of the Guidelines presented here, demonstrates that the district court and the court of appeals misapplied the Guidelines in Mr. Taylor's case. This Court, therefore, should issue a writ of certiorari to address and clarify the correct application of the Sentencing Guidelines provisions involved in this case.

Subsections (a)(4) and (a)(5) of section 3553, Title 18, United States Code, require the district court, in considering the sentence to be imposed, to consider:

> (4) the kinds of sentences and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission ...; [and]
>
> (5) any pertinent policy statement issued by the Sentencing Commission ... .

18 U.S.C. § 3553(a)(4), (5).

Section 4A1.1 requires the assignment of certain points to a defendant in order to calculate his criminal history score and criminal history category. See Sentencing Guidelines § 4A1.1. Section 4A1.3, however, recognizes that the criminal history category might not "adequately reflect the

defendant's past criminal conduct" and allows the court "to consider imposing a sentence departing from the otherwise applicable guideline range." Id. § 4A1.3. Under this provision, a departure "is warranted when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes." Id.

The Guidelines make clear that, in departing upward on this basis, the sentencing court cannot completely disregard the Guidelines:

> In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher ... criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history category of III significantly under-represents the seriousness of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with a Category IV criminal history, the court should look to the guideline range specified for a defendant with a Category IV criminal history to guide its departure.

Id.

In the Lopez opinion, which the Fifth Circuit issued subsequent to its opinion in this case, the court addressed the same issue presented here, but vacated the sentence in that case and remanded for resentencing. See Lopez, 871 F.2d at 514-15. In Lopez, the district court had departed upward from the guideline imprisonment range of four to ten months and had sentenced the defendant to a term of imprisonment for two years. The district court had justified the departure on the ground that the defendant's criminal history category of I "under represented defendant's past criminal behavior and her likely recidivism." Id. at 514.

In vacating the defendant's sentence, the Fifth Circuit concluded that the district court "should not have completely disregarded the Guidelines without further explanation." Id.

at 515. The court further explained the proper procedure for departing upward on the basis that the defendant's criminal history category underrepresents the seriousness of the defendant's criminal history:

> Under section 4A1.3, the judge should have considered the sentencing ranges that would be indicated by raising the defendant's criminal history category to II or higher ... . The two-year departure sentence imposed is the maximum shown for criminal history category V (the second highest criminal history category). Apparently, there was no consideration of the possible sentences using categories II-IV to adjust for the defendant's criminal history ... .
>
> ... The Guidelines require sentencing courts first to consider upward adjustments of the criminal history category, where a defendant's score appears inadequately to reflect his or her history, before a departure sentence may be justified on this basis. Where this is not done, resentencing is appropriate.

Id. (footnote omitted.) Since it issued the Lopez opinion, the Fifth Circuit has reiterated that district courts must follow the procedures set out in Lopez when they depart upward based upon the defendant's criminal history. See United States v. Burch, No. 88-2680, slip op. at 3724 (5th Cir. May 10, 1989).

Because the district court in Mr. Taylor's case failed to follow the dictates of section 4A1.3 of the Sentencing Guidelines, it violated the statutory directives of subsections (a)(4) and (a)(5) of 18 U.S.C. § 3553. The procedurally improper imposition of sentence upon Mr. Taylor also violated his constitutional right to due process of law. See Hicks v. Oklahoma, 447 U.S. 343, 346-47 (1980). As section 4A1.3 of the Sentencing Guidelines and Lopez demonstrate, therefore, this case presents a significant issue of the proper application of federal law that warrants the issuance of a Writ of Certiorari and the resentencing of Mr. Taylor.

CONCLUSION

For these reasons the Petitioner respectfully prays that his application for Writ of Certiorari be granted by this Court.

DATE: June 12, 1989

Respectfully submitted,

ROLAND E. DAHLIN II
Federal Public Defender
Southern District of Texas

By H. Michael Sokolow
H. MICHAEL SOKOLOW
JUAN E. GAVITO
Asst. Federal Public Defenders
Attorneys for Petitioner
Post Office Box 61508
Houston, TX 77208-1508
Telephone: (713) 220-2194
(FTS) 526-4194

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-6158
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CARLOS A. TAYLOR,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
(B-CR-88-186)

(April 12, 1989)

Before REAVLEY, JOHNSON and JOLLY, Circuit Judges.

PER CURIAM:*

In this case we consider whether the district court adequately justified its departure from the sentencing guidelines.

Because Taylor pled guilty to one count of forcibly impeding a customs officer, the government dropped three other charges

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

against him, including an additional count of impeding a customs officer, a count of possession of less than fifty kilograms of marijuana, and a count of importing less than fifty kilograms of marijuana. The district court sentenced Taylor to eighteen months imprisonment and a one-year term of supervised release.

The presentence investigation report noted that the sentencing guidelines prescribed a term of imprisonment between two and eight months for Taylor's offense, but recommended a sentence of eighteen months because of the seriousness of Taylor's criminal history.

Under the sentencing guidelines, Taylor was assessed criminal history points for his previous conviction on a 1986 weapons charge, and his conviction in 1988 for burglary of a vehicle. No points were assessed for his 1982 conviction for the unauthorized use of a motor vehicle, for which he received a three-year suspended sentence, or for his 1982 conviction for theft, for which he was fined, because both offenses occurred when he was less than eighteen years old (seventeen) and more than five years before the incident giving rise to the federal charge. See Sentencing Guidelines § 4A1.2(d)(2). Taylor also had a state charge of marijuana possession pending at the time of the federal offense.

Sentencing Guideline § 4A1.3 authorizes a departure from the guideline range when "the criminal history category does not

adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." Subparts (a) and (d) of that section allow the sentencing judge, in making such a departure, to take into account reliable information concerning the defendant's prior sentences not used in computing the criminal history category, and whether the defendant was pending trial on another charge at the time of the instant offense.

Taylor asserts that the upward departure from the sentencing guidelines was not justified in his case. He argues, citing 18 U.S.C. § 3553(b), that because the district court did not state reasons for increasing his sentence to eighteen months, the departure was arbitrary.

In this case, the sentencing judge stated that he was departing from the guideline range because he felt that the sentencing guidelines score did not adequately take into consideration Taylor's criminal history: "A look at his prior involvements and his prior convictions and his general demeanor and conduct certainly calls for consideration that does not exist in the guidelines . . . [a]nd for that reason I am departing from the guidelines." The statements of the district judge indicate that he relied on section 4A1.3 to justify the departure from the guidelines.

In United States v. De Luna-Trujillo, No. 88-2689, slip op. at 2399 (5th Cir. Mar. 6, 1989), we stated that where the district court relies on section 4A1.3 to depart from the guidelines, it should clearly identify its reasons for doing so. See also United States v. Fisher, No. 88-1790, slip op. 2412 (Mar. 7, 1989). In this case, although we cannot say that the district court explicitly set forth its reasons for the upward departure from the guidelines, the meaning of the court's remarks is plainly discernible from a review of the entire record, including the presentence report. The district court was referring to the fact that Taylor's criminal-history score did not accurately reflect his actual criminal history, including his offenses committed as a minor, and the likelihood of his recidivism, which are valid concerns under the guidelines. See Commentary to section 4A1.3. Although we think that the district court could have been more explicit in the light of our instructions in De Luna-Trujillo, we affirm the sentence since the court's intentions are clear to us, from the record as a whole, and because we are convinced that the district court properly applied the guidelines to fashion an appropriate sentence in this case.

The judgment of the district court is therefore

A F F I R M E D.

PROCEEDINGS

NOVEMBER 11, 1988

THE COURT: Cause B-88-186, UNITED STATES OF AMERICA VERSUS CARLOS A. TAYLOR. I am going to set aside the forfeiture. Carlos A. Taylor --

DEFENDANT TAYLOR: Yes, Your Honor.

THE COURT: Have you had an opportunity to look at your presentence investigation?

DEFENDANT TAYLOR: Yes, Your Honor.

THE COURT: Is there anything contained therein that is not correct?

DEFENDANT TAYLOR: No, Your Honor.

MR. GAVITO: Have minor one, Judge. There is a reference to his grandfather and father. He calls his grandfather father. He is not trying to deceive anybody about the two.

THE COURT: Are you trying to spend a lot of time in the penitentiary?

DEFENDANT TAYLOR: No, Your Honor.

THE COURT: Well, you read this like I read this. You have got to admit that you do some things that are uncalled for. As a matter of fact, the only reason you got into trouble -- even the prosecutorial version indicates that you weren't violent as such. But this offense was committed in your attempt to evade officers there at the bridge. And in

the process you knocked one of them down or hit one of them. Not with your fist or anything like that. Does that make any sense? Doesn't make any sense, does it, for you to do that?

DEFENDANT TAYLOR: No.

THE COURT: They are going to do their thing. You understand that. And they are going to be protected. You understand that, too.

DEFENDANT TAYLOR: Yes, Your Honor.

THE COURT: Do you have anything to say to me before I decide what to do in your case?

DEFENDANT TAYLOR: No, sir.

THE COURT: I am going to depart from the guidelines and commit you to the custody of the Attorney General for a period of 18 months. The departure is resultant of the fact that you are -- one looks at your past and one must consider the fact that you must get some counseling or something. Cool it, man.

DEFENDANT TAYLOR: Yes, Your Honor.

THE COURT: I think you already have two felonies don't you?

DEFENDANT TAYLOR: Yes, sir.

THE COURT: Your attorney will tell you that here in Federal Court we only enhance in general course in matters of narcotics and drugs. But the State Court uses all of these against you. If you ever get into trouble again, they are

going to enhance you as an habitual and your attorney or judge is not going to be able to do anything about it. You understand that?

DEFENDANT TAYLOR: Yes.

THE COURT: I am also going to impose a supervised release term of one year and find that no fine should be imposed against you because of your inability to pay. But I am going to impose an assessment of $50 as required by law.

MR. GAVITO: Will the Court note our exception to the Court departing upward in this case. I have to discuss it with him to see what --

THE COURT: I want the record to show that I am departing because of the fact that -- although the particulars in this incident for which he was convicted by his plea of guilty are not aggravating; that a look at his prior involvements and his prior convictions and his general demeanor and conduct certainly call for consideration that does not exist in the guidelines by which he needs to comform his conduct to abide by law. And for that reason I am departing from the guidelines.

MR. GAVITO: And our objection goes to the issue, Judge, of the --

THE COURT: The eight months to eighteen months.

MR. GAVITO: From two to eight according to the guidelines. And the guidelines did take those prior

convictions into account in assessing higher points to arrive at Category 3.

THE COURT: I understand. I understand.

MR. GAVITO: Very well.

THE COURT: I don't agree with the guidelines because of their assessment of prior involvement in giving the points. By that standard, for example, a person could have ten convictions and they only give two or three points. I don't agree with that. You have got to look at each case separately.

I am going to recommend that he receive counseling during the period of his confinement.

Have you discussed his right of appeal with him?

MR. GAVITO: Yes, sir.

(Proceedings adjourned.)

IN THE UNITED STATES DISTRICT COURT:

FOR THE SOUTHERN DISTRICT OF TEXAS:

I, WILLIAM G. HOLLOWAY, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Wm Holloway — 1-26-89

WILLIAM G. HOLLOWAY
OFFICIAL COURT REPORTER

DATE

UNITED STATES of America,
Plaintiff-Appellee,

v.

Esperanza LOPEZ,
Defendant-Appellant.

No. 88-2962
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

April 14, 1989.

Defendant pled guilty to multiple counts of violating federal immigration laws in the United States District Court for the Southern District of Texas, Kenneth M. Hoyt, J., and she appealed. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) finding that criminal history score did not adequately reflect defendant's criminal history was not clearly erroneous, but (2) sentencing judge could not merely disregard guidelines based on finding that criminal history score underrepresented defendant's past conduct and propensity to commit future crime, when he should have considered increasing criminal history category by one or more levels to adjust for situation.

Vacated and remanded.

1. Criminal Law ⇐986.2(4)

Finding that lowest possible criminal history score did not adequately reflect defendant's criminal history was not clearly erroneous; defendant had been twice convicted for conspiracy to import aliens barely outside the ten-year limit for calculating the criminal history score. Sentencing Guidelines, §§ 4A1.2(e)(2), 4A1.3.

2. Criminal Law ⇐986.2(4), 1208.1(3)

Sentencing judge who believed that criminal history score of zero, although correct, underrepresented defendant's past criminal behavior and likely recidivism, was required to consider sentencing ranges that would be indicated by raising the criminal history score, but could not merely bypass guidelines altogether. Sentencing Guidelines, §§ 4A1.2(e)(2), 4A1.3.

Roland E. Dahlin, II, Federal Public Defender, H. Michael Sokolow, Asst. Federal Public Defender, Houston, Tex., for defendant-appellant.

Paula C. Offenhauser, Asst. U.S. Atty., Henry K. Oncken, U.S. Atty., Houston, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before POLITZ, KING, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

In this Sentencing Guidelines ("Guidelines") case we are confronted with a significant question concerning the appropriateness of departure from the Guidelines. Specifically, we must determine whether it is proper to disregard the Guidelines based upon the finding that a defendant's criminal history score inadequately accounts for her past conduct and propensity to commit future crimes, when the sentencing court instead could have considered increasing the criminal history category by one or more levels to adjust for this situation.

I.

Defendant Esperanza Lopez pleaded guilty to multiple counts of violating the federal immigration laws as part of a plea bargain under which the government promised not to oppose lenient sentencing by the district judge. Despite prior violations of the immigration laws, defendant scored a zero on her criminal history calculation under the Guidelines, because the sentences for those offenses were imposed more than ten years prior to the commencement of the instant offense. *See* Guidelines § 4A1.2(e)(2). This criminal history score of zero points placed the defendant in criminal history category I, the lowest possible category. In combination with her offense level of 9, the defendant's criminal history category indicated a recommended sentencing range of four to ten months. At the sentencing hearing, the district judge stated that although the criminal history calculation was correct, it nonetheless underrepresented defendant's past criminal behavior and her likely recidivism. He accordingly departed from the Guidelines on this explicit basis, imposing a sentence of two years' imprisonment plus two years' supervised probation and a $50 special assessment.

II.

There is no question that a sentencing court may sometimes justify its departure from the Guidelines based upon the inadequacy of a defendant's criminal history score. *United States v. De Luna-Trujillo*, 868 F.2d 122, 124 (5th Cir.1989); *United States v. Fisher*, 868 F.2d 128, 129–30 (5th Cir.1989). However, the Guidelines provisions treating adjustments for criminal history indicate that in considering a departure from the Guidelines,

> the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history category of III significantly under-represents the seriousness of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with a category IV criminal history, the court should look to the guideline range specified for a defendant with a category IV criminal history to guide its departure.

Guidelines § 4A1.3.

III.

[1] In this case, we accept, as we should, the district judge's finding that category I does not adequately reflect defen-

dant's criminal history, as that finding is not clearly erroneous and in fact appears entirely correct. *See United States v. Mejia-Orosco*, 867 F.2d 216, 221 (5th Cir.) (Per Curiam), *on petition for rehearing*, 868 F.2d 807 (5th Cir.1989). The defendant, in 1977, was convicted twice for conspiracy to import aliens. These convictions were barely outside the ten-year limit of section 4A1.2(e)(2). Thus, the district court was justified in considering that a level of zero was not representative of defendant's true criminal history. Nevertheless, we conclude that the court should not have completely disregarded the Guidelines without further explanation.

[2] Under section 4A1.3, the judge should have considered the sentencing ranges that would be indicated by raising defendant's criminal history category to II or higher. Instead, he appears to have bypassed the Guidelines altogether. The two-year departure sentence imposed is the maximum shown for a criminal history category of V (the second highest criminal history category). Apparently, there was no consideration of the possible sentences using categories II–IV to adjust for defendant's criminal history.[1] Nor can we conclude, without further explanation from the district court, that this history was so patently outrageous that any such adjustments would be inadequate.

Under the circumstances, the case must be remanded for resentencing. The Guidelines require sentencing courts first to consider upward adjustments of the criminal history category, where a defendant's score appears inadequately to reflect his or her history, before a departure sentence may be justified on this basis. Where this is not done, resentencing is appropriate.

In so holding, we emphasize that in some cases involving defendants with low criminal history scores, it may be justified to impose a sentence reflecting a much higher criminal history category or to go beyond the range corresponding to the highest category VI. However, in such cases the sentencing judge should state definitively that he or she has considered lesser adjustments of the criminal history category and must provide the reasons why such adjustments are inadequate. Here, we express no view as to the ultimate propriety of the two-year sentence or of any other lesser or greater sentence that may be imposed on resentencing. We remand only to ensure that the appropriate methodology is followed under the Guidelines.

For the above reasons, the sentence is VACATED, and the case is REMANDED for resentencing.

1. We clarify that the two-year sentence was a departure sentence, not one arrived at using a Category V criminal history. Our reference to the fact that this sentence falls into the range

NO. _____ 88-7503

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

CARLOS A. TAYLOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE
TO PROCEED
IN FORMA PAUPERIS

Petitioner, CARLOS A. TAYLOR, pursuant to Rule 46 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by appointed counsel on appeal to the United States Court of Appeals for the Fifth Circuit.

Date: June 12, 1989

Respectfully submitted,

ROLAND E. DAHLIN II
Federal Public Defender
Southern District of Texas

By H. Michael Sokolow
H. MICHAEL SOKOLOW
Asst. Federal Public Defender
Attorneys for Petitioner
Post Office Box 61508
Houston, TX 77208-1508
Telephone: (713) 220-2194
(FTS) 526-4194

Supreme Court, U.S.
FILED
6-12 1989
JOSEPH F. SPANIOL, JR.
CLERK

RECEIVED
JUN 15 1989
OFFICE OF THE CLERK
SUPREME COURT, U.S.

88-7503

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

CARLOS A. TAYLOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RECEIVED
JUN 15 1989
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

H. Michael Sokolow, a member of the Bar of this Court, certifies that, pursuant to Rule 28, he served the preceding Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed in Forma Pauperis on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid and addressed to:

The Honorable Kenneth W. Starr
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

and depositing the envelope in the United States Post Office, Civic Center Station, Houston, Texas 77208, on June 12, 1989, and further certifies that all parties required to be served have been served.

H. Michael Sokolow
H. MICHAEL SOKOLOW

10